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No. 15-6092

In the Supreme Court of the United States

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court may employ the "modified categorical approach" under *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), to determine whether a defendant was convicted of a crime constituting a predicate offense under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), such as generic "burglary," when a defendant has been convicted under a state statute that sets out, in the alternative, several forms of committing an offense, or whether instead the applicability of the modified categorical approach depends on a state-law inquiry into whether the alternative forms of the offense represent "means" or "elements."

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OPINION BELOW

The opinion of the court of appeals (J.A. 7-21) is reported at 786 F.3d 1068.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2015. A petition for rehearing was denied on June 23, 2015 (J.A. 22). The petition for a writ of certiorari was filed on September 15, 2015, and was granted on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. Congress enacted the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to incapacitate repeat offenders who have been convicted of serious

crimes. See *Taylor* v. *United States*, 495 U.S. 575, 581 (1990). The statute increases the statutory maximum sentence, and requires a 15-year mandatory minimum sentence, if a defendant is convicted of being a felon in possession of a firearm following three previous convictions for a "violent felony" or "serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion." 18 U.S.C. 924(e)(2)(B)(ii).

The question in this case is whether an Iowa burglary conviction qualifies as a conviction for "burglary" under the ACCA. In a series of decisions, this Court set out a framework for answering that question. See *Descamps* v. *United States*, 133 S. Ct. 2276, 2281-2282 (2013); *Shepard* v. *United States*, 544 U.S. 13, 19-20, 26 (2005); *Taylor*, 495 U.S. at 598-600. The federal sentencing court first compares the definition of the prior offense in the state statute of conviction to the definition of "generic" burglary under the ACCA. *Taylor*, 495 U.S. at 599. If the state-law definition is the same as, or narrower than, the definition of the generic offense, the state conviction qualifies as one for ACCA "burglary" on a categorical basis. *Ibid.*

If the state-law definition is broader than the generic offense, then the court asks whether the state statute is divisible, *i.e.*, whether it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct at 2284. If the text of the statute sets out alternative versions of the offense, one of which is the generic offense, the statute is textually divisible and a court may use the modified categorical approach to determine whether the defendant was convicted of the generic form of the offense. *Shepard*, 544 U.S. at 17;

Taylor, 495 U.S. at 599, 602. Under that approach, the court looks to a limited class of conviction documents (such as the charging document and jury verdict or guilty plea) to determine whether the jury necessarily found or the defendant necessarily admitted elements of the generic offense in the prior proceeding. *Shepard*, 544 U.S. at 26. If the state statute is broader than the generic offense and does not list an alternative version of the offense that corresponds to generic burglary, the sentencing court may not use the modified categorical approach, because the conviction documents cannot establish that the defendant necessarily was convicted of the generic offense. *Descamps*, 133 S. Ct. at 2285-2286.

Petitioner contends that a sentencing court must add another step before it can conclude that a state statute is divisible and therefore can be analyzed using the modified categorical approach. In his view, it is not enough for the court to conclude that an alternative phrasing of the offense matches the definition of generic burglary. In addition, he says, the federal sentencing court must decide whether, as a matter of state law, the alternative phrasing is an "element" of the offense or a "means" of committing the offense. (A statutory alternative is a means, rather than an element, if a defendant charged with two alternatives could be convicted based on a finding that he satisfied either one of the alternatives, without the factfinder deciding which one. See *Schad* v. *Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion).) In petitioner's view, if the alternative phrasing is a "means," the state statute is not divisible and the offense is never an ACCA predicate—even if the defendant was

charged with and convicted of the alternative corresponding to generic burglary.

2. In February 2013, police in Marion, Iowa, were investigating the disappearance of K.G., a 15-year-old boy. J.A. 8; Presentence Investigation Report (PSR) ¶ 8. Police tracked the missing child to petitioner's house. J.A. 8. Petitioner's girlfriend answered the door and said petitioner was not home and she did not know K.G.'s whereabouts. *Ibid.* That was a lie: petitioner was inside the house with K.G. and two other young boys. *Ibid.* Petitioner had sexually molested K.G. and he threatened to hurt K.G. if K.G. said anything to the police. *Ibid.*; PSR ¶¶ 12, 17.

K.G. returned home and reported the sexual abuse to the police. J.A. 8. The police obtained a warrant to search petitioner's house. *Ibid.* During the search, they found a loaded gun and ammunition, as well as evidence establishing that petitioner made contact with underage boys through a social networking site, sent them sexually explicit messages, and lured them to his house. *Ibid.* The police arrested petitioner, and he admitted that he owned the gun and ammunition. J.A. 9.

3. A grand jury returned an indictment charging petitioner with possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). J.A. 42-43. Petitioner pleaded guilty. J.A. 9, 44-59.

At sentencing, the government argued that petitioner was subject to the ACCA because he has six prior convictions for violent felonies—five Iowa burglary convictions and one Iowa conviction for interference with official acts causing serious injury. Gov't Sent. Mem. 1 (May 6, 2014) (D. Ct. Doc. 55); see PSR

¶ 31.[1] The parties agreed that the Iowa burglary statute is broader than generic burglary, because generic burglary involves unlawful entry into a "building" or "structure," *Taylor*, 495 U.S. at 599, and the Iowa statute prohibits unlawfully entering additional places, such as "vehicle[s]." Gov't Sent. Mem. 3-4 (citing Iowa Code § 713.1 (1989) (defining burglary as unlawful entry into an "occupied structure"), and Iowa Code § 702.12 (1989) (defining "occupied structure" through an enumerated list of places that includes buildings, structures, and vehicles)); see Def.'s Sent. Mem. 4 (May 29, 2014) (D. Ct. Doc. 58).[2]

The government explained that because the Iowa statute sets out alternative versions of the offense

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[1] Petitioner disputed the characterization of his interference-with-official-acts offense as an ACCA predicate in the district court but abandoned that argument in the court of appeals. J.A. 11 n.2. Petitioner now seeks to revive the issue (Br. 7 n.2), but his arguments lack merit. Contrary to petitioner's contentions, the district court found that the interference-with-official-acts offense was an ACCA predicate, see J.A. 35, and that finding was based on the first part of the ACCA's definition of "violent felony," 18 U.S.C. 924(e)(2)(B)(i), not the residual clause (which recently was invalidated in *Johnson* v. *United States*, 135 S. Ct. 2251 (2015)), see Gov't Sent. Mem. 6-7 (citing *United States* v. *Malloy*, 614 F.3d 852, 859-860 (8th Cir. 2010), cert. denied, 131 S. Ct. 3023 (2011)); J.A. 35 (relying on *Malloy*). Even if this offense did not qualify as an ACCA predicate, it would not matter; petitioner's five burglary convictions are ACCA predicates for the reasons stated in this brief.

[2] The courts below conducted their analyses using the 1989 version of the Iowa Code, which applied to four of petitioner's five burglary convictions. J.A. 15 n.4. The 1979 version of the Code, which applied to the fifth conviction, is not materially different. See Iowa Code §§ 702.12, 713.1 (1979). (Nor is the current version of the Code. See *id.* §§ 702.12, 713.1 (2015)).

through a list of alternative places that can be burgled, the statute is textually divisible and the modified categorical approach applies. Gov't Sent. Mem. 3-4. Under that approach, petitioner's convictions qualify as ACCA predicates because the conviction documents establish that petitioner burgled buildings or structures (specifically, a "house and garage," a "garage," a "garage," a "machine shed," and a "storage shed"). *Id.* at 4-6; J.A. 60-73. Petitioner contended that his convictions cannot qualify as ACCA predicates because under Iowa law, the list of places unlawfully entered sets out "illustrative examples" and not "alternative elements" of the burglary offense. Def.'s Sent. Mem. 5. (Petitioner did not cite any Iowa law for that proposition. See *ibid.*) Petitioner did not dispute that the conviction documents established that his prior convictions were for burgling buildings or structures. *Id.* at 5-6.

The district court applied the ACCA enhancement. J.A. 34-35. The court determined that the Iowa statute is divisible because its text sets out alternatives and concluded that the documents from petitioner's prior convictions establish that his burglary offenses all involved buildings or structures. *Id.* at 29, 34-35.

4. The court of appeals affirmed. J.A. 7-21. The court determined that, although the Iowa burglary statute "sweeps more broadly than generic burglary" because the term "occupied structure" includes vehicles, the statute is textually divisible based on its list of places. J.A. 16-17. The court explained that the Iowa statute "exhibits the exact type of divisibility" contemplated by this Court in *Taylor* and *Shepard*, because it sets out an alternative that "conforms with generic burglary" ("entry into a 'building' or 'struc-

ture'") and one that does not ("entry into [a] 'land, water or air vehicle.'"). J.A. 17 (quoting Iowa Code § 702.12 (1989)). The court therefore applied the modified categorical approach and concluded that petitioner's conviction documents establish that he had been convicted of generic burglary. J.A. 16-19.

Petitioner had argued that the modified categorical approach is inapplicable because the definition of "occupied structure" in the Iowa statute "do[es] not present alternative elements, but instead simply present[s] different types of occupied structures." J.A. 17. The court of appeals rejected that view, explaining that whether the places listed in the statute "amount to alternative elements or merely alternative means to fulfilling an element" does not matter to whether the statute is divisible. J.A. 17-19 (relying on *Descamps*, 133 S. Ct. at 2285 n.2).

SUMMARY OF ARGUMENT

A federal sentencing court may use the modified categorical approach to determine whether a prior state or federal offense qualifies as "burglary" under the ACCA when the statute is textually divisible, meaning that it sets out alternative ways of committing the offense. The court need not conduct a separate inquiry into whether those alternatives are "means" or "elements" under state law.

A. Under *Taylor* v. *United States*, 495 U.S. 575 (1990), whether a prior state or federal conviction is one for ACCA "burglary" depends on whether "the statutory definition" of the prior crime categorically matches the "generic" definition of burglary. *Id.* at 599-600. If the statutory definition of the prior offense is broader than generic burglary, the modified categorical approach may be applied if the statute is

divisible. *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013). As the government interprets *Descamps*, a statute is divisible when the statutory text sets out alternatives in the disjunctive and at least one alternative is a categorical match for the generic offense. In such a case, the sentencing court may look to a limited class of conviction documents to determine whether the defendant's prior conviction was for the generic offense.

B. Petitioner contends that a statute is not divisible (and the modified categorical approach may not be used) when the statutory alternatives are "means," rather than "elements," under state law. To answer that means-versus-elements question, the federal court must determine whether, in a state case where multiple alternatives were charged and submitted to the jury, the jury would have to agree on one particular alternative in order to convict.

This Court has never adopted petitioner's approach. In none of its modified categorical approach decisions did the Court conduct a state-law inquiry into "means" or state that such an analysis is required before a statute is divisible. Instead, the Court has based divisibility on the text of the statute: if the text lists alternatives in the disjunctive, it is divisible. If petitioner were correct, it would mean that this Court's decisions in *Taylor*, *Shepard*, *Descamps*, and several other modified categorical approach cases were either materially incomplete or wrongly decided.

Petitioner relies on this Court's use of the word "elements" in its decisions, particularly in *Descamps*. But the Court used "elements" to refer to the statutory definition of the offense, not to distinguish between "means" and "elements." Indeed, in *Descamps* the

Court expressly equated "statutory definitions" and "elements": "Sentencing courts may 'look only to the *statutory definitions*'—*i.e.*, *the elements*—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" 133 S. Ct. at 2283 (quoting *Taylor*, 495 U.S. at 600 (emphasis added)).

C. Petitioner contends that his approach is required to ensure that a defendant had been convicted of all elements of generic burglary in his prior proceeding. But the modified categorical approach itself provides that assurance. If a defendant was charged with burgling a building (and no other place), and the jury convicted him, the "jury necessarily had to find" (*Taylor*, 495 U.S. at 602) that the defendant committed generic burglary. It does not matter whether the type of place is a "means" under state law; when only one means is charged, the government necessarily proves the element by proving the means.

Petitioner is likewise mistaken in contending that his approach is required to avoid constitutional concerns. Under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), any fact, other than the fact of a prior conviction, that increases the defendant's sentence beyond the otherwise-applicable statutory maximum must be proven beyond a reasonable doubt. *Id.* at 490. As a result, a sentencing court characterizing a prior offense may use only the approved conviction documents, not its own factfinding. But the modified categorical approach already includes that limitation, and it does not depend on whether a statutory alternative is a "means" or an "element" under state law.

D. Federal district courts and immigration judges routinely apply the modified categorical approach.

They "need a clear and easy-to-apply rule for distinguishing between statutes that are divisible and those that are not." *Almanza-Arenas* v. *Lynch*, No. 09-71415, 2016 WL 766753, at *9 (9th Cir. Feb. 29, 2016) (en banc) (Watford, J., concurring). Petitioner's approach is just the opposite. The state-law question whether a certain phrase in a statute represents a "means" or an "element" is often a complex and difficult question of statutory interpretation. Frequently there is no authoritative state decision answering that question. *Descamps* therefore appropriately directed federal courts not to "parse state law" to determine whether a statutory alternative is divisible. 133 S. Ct. at 2285 n.2.

Adopting petitioner's approach would seriously undermine the ACCA's purposes. Congress enacted the ACCA to incapacitate repeat offenders who commit serious crimes, and it was particularly concerned about burglary. This Court adopted a categorical approach in *Taylor* so that it could ensure that burglary convictions from "most States" (495 U.S. at 598) would qualify as ACCA burglary. But under petitioner's approach, few state convictions may qualify at all. Petitioner's approach therefore would substantially increase the workload of federal district courts and immigration judges, only to exempt the very defendants Congress wanted to reach. And these problems would be multiplied across the numerous other applications of the modified categorical approach.

E. Under the correct approach, the Iowa burglary statute is divisible. This Court therefore should affirm the judgment of the court of appeals.

ARGUMENT

A COURT MAY USE THE MODIFIED CATEGORICAL APPROACH TO DETERMINE WHETHER A PRIOR OFFENSE QUALIFIES AS "BURGLARY" UNDER THE ACCA WHEN THE STATUTE OF CONVICTION SETS OUT ALTERNATIVE WAYS OF COMMITTING THE OFFENSE, WITHOUT REGARD TO WHETHER THOSE ALTERNATIVES ARE MEANS OR ELEMENTS

Petitioner has five burglary convictions in Iowa. He contends that none of those convictions qualifies as a conviction for "burglary" under the ACCA—even though the Iowa burglary statute is textually divisible (because it identifies several alternative ways of committing the offense) and his conviction documents establish that his offenses involved buildings or structures (and therefore qualify as generic burglary). This Court has never required the state-law inquiry that petitioner advocates, and it disclaimed such an inquiry in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). Petitioner's approach is inconsistent with this Court's decisions, and it would create significant practical difficulties and disserve the statute's purposes. This Court should reject it.

A. Whether A State Offense Qualifies As An ACCA Predicate Depends On The Text Of The State Statute And The Prior Conviction Documents

1. The ACCA enhances the sentence of a defendant who is convicted of unlawful firearm possession when the defendant has three prior convictions for "violent felon[ies]." 18 U.S.C. 924(e)(1). The statute defines a "violent felony" to include any crime punishable by more than one year that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court set out an approach for determining whether a prior state or federal conviction qualifies as "burglary" under the ACCA. The Court first concluded that Congress intended the term "burglary" to have its "generic, contemporary meaning," used in most States, which is the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

The Court then addressed how to determine whether a prior offense corresponds to "generic" burglary. The Court set out a "categorical approach" for answering that question, under which a state offense that "ha[s] certain common characteristics" with generic burglary qualifies as ACCA "burglary," regardless of how the State labels the offense. *Taylor*, 495 U.S. at 588-589. The sentencing court compares "the statutory definition" of the state crime to the definition of generic burglary, and if the state definition matches generic burglary, the state conviction qualifies as "burglary" under the ACCA. *Id.* at 599, 600. If the state statute is narrower than the generic definition of burglary (because, for example, it includes an aggravating factor not present in generic burglary), the state conviction also qualifies, because a conviction under that statute "necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Id.* at 599.

The Court recognized, however, that some States "define burglary more broadly" than generic burglary. *Taylor*, 495 U.S. at 580, 599. For example, some States "includ[e] places, such as automobiles and vending machines, other than buildings." *Id.* at 599; see *id.* at 591, 599 (citing statutes in California, Mis-

souri, and Texas). When state law includes such a list, the sentencing court may "go beyond the mere fact of conviction" and look to state conviction documents to determine whether the defendant was convicted of the generic version of the offense. *Id.* at 602. The Court explained:

> [I]n a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Ibid. The Court later described this use of court documents to determine the basis for a conviction under a divisible statute as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2281, 2283-2284.

The Court made clear that a sentencing court is not to "engage in an elaborate factfinding process" to review the details of each defendant's prior conduct. *Taylor*, 495 U.S. at 601. Such judicial factfinding would create "practical difficulties" by requiring the sentencing court to undertake a difficult and time-consuming inquiry even in routine cases. *Id.* at 601-602. The virtue of a categorical approach, the Court explained, is that the sentencing court reviews only a limited class of information to decide whether a state offense corresponds to ACCA burglary. *Id.* at 600-602.

2. The fundamentals of the categorical approach have not changed in the 25 years since *Taylor*. But the Court has elaborated on that approach in two decisions, both of which (like *Taylor* itself) addressed

whether a prior state conviction qualified as "burglary" under the ACCA.

a. In *Shepard* v. *United States*, 544 U.S. 13 (2005), the Court addressed which conviction documents a sentencing court may use under the modified categorical approach to decide whether a defendant's prior conviction was for the generic form of burglary. The defendant's convictions were for burglary under Massachusetts law, and Massachusetts law was broader than generic burglary because it prohibited unlawful entry into boats and automobiles as well as buildings and structures. *Id.* at 16-17. Because the statute specified these places in the alternative, the Court explained, the sentencing court could review conviction documents to determine whether a defendant who pleaded guilty "necessarily admitted elements of the generic offense." *Id.* at 16-17, 26; see 18 U.S.C. 924(e)(1) (requiring that the defendant be "convict[ed]" of three qualifying offenses).

The Court then addressed which conviction documents a sentencing court may review. To "avoid[] * * * evidentiary enquiries into the factual basis for the earlier conviction," the Court explained, the sentencing court should look only to "charging documents filed in the court of conviction" and "recorded judicial acts of that court limiting convictions to the generic category." *Shepard*, 544 U.S. at 20. As examples of appropriate "judicial record evidence," the Court cited jury instructions and the verdict (for a case that went to trial) or the plea agreement, transcript of plea colloquy, and factual findings assented to by the defendant (for a case resolved by guilty plea). *Id.* at 16-17, 20. Limiting the inquiry to those judicial records with "conclusive significance" avoids

the constitutional concerns that "would follow from allowing a broader evidentiary enquiry" by the sentencing court. *Id.* at 24-25 (plurality opinion).

b. In *Descamps*, the Court considered a state statute that was broader than generic burglary but not textually divisible into alternatives. The California burglary statute prohibited "enter[ing]" certain locations without specifying that the entry must be unlawful (as is required for generic burglary). 133 S. Ct. at 2282. Because the text of the state statute could not be divided into alternative forms of the offense, the Court found the modified categorical approach inapplicable; the sentencing court could not use conviction documents to "identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." *Id.* at 2285.

Descamps explained that the modified categorical approach may be used for a burglary offense only when a statute is divisible, meaning that it "defines burglary * * * alternatively, with one statutory phrase corresponding to the generic crime and another not." 133 S. Ct. at 2286.[3] As an example of a divisible statute, the Court cited a "burglary statute (otherwise conforming to the generic crime) that prohibits entry of an automobile as well as a building"—the same example used in *Taylor*. *Id.* at 2284 (internal quotation marks omitted). The Court confirmed that a sentencing court faced with such a statute may "examine a limited class of documents" (identified in *Shep-*

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[3] The Court reserved whether the sentencing court can "take account not only of the relevant statute's text, but of judicial rulings interpreting it," *Descamps*, 133 S. Ct. at 2291, and it did not address common-law crimes.

ard) to determine which alternative was the basis for the defendant's conviction. *Ibid.*

3. These decisions establish a straightforward approach for determining whether a prior conviction is one for generic "burglary" under the ACCA: The sentencing court compares the statutory definition of the prior offense to the definition of generic burglary set out in *Taylor*. If the state offense uses the same definition as generic burglary (or a narrower one), the prior conviction qualifies as ACCA "burglary," with no further inquiry. If the statutory definition of the prior offense is broader than generic burglary and is textually divisible, the sentencing court may review the conviction documents approved in *Shepard* to determine whether the defendant was convicted of generic burglary. If the prior offense definition is broader than generic burglary and is not textually divisible (as in *Descamps*), the modified categorical approach may not be used because the sentencing court cannot determine from the conviction documents whether the prior conviction was for generic burglary.

The Court has used this approach in a variety of other contexts, including determining whether a prior conviction is for an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), see *Johnson* v. *United States*, 559 U.S. 133, 136-137, 144 (2010); whether a prior conviction qualifies under the ACCA's (now-invalid) residual clause, see, *e.g.*, *Chambers* v. *United States*, 555 U.S. 122, 125-126 (2009); and whether a prior conviction is one for a specified aggravated felony under the immigration laws, see, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 185-190 (2007) (discussing 8 U.S.C.

1101(a)(43)(G)).[4] And the Court has confirmed that although its decisions about the enumerated-crimes provision of the ACCA all involved burglary, the same analysis applies to the other enumerated crimes (arson, extortion, and crimes involving use of explosives). *Shepard*, 544 U.S. at 17 n.2.

B. The Modified Categorical Approach Does Not Depend On Whether A Statutory Alternative Is A "Means" Or An "Element" Under State Law

1. Petitioner contends (Br. 15-25) that the foregoing discussion of the modified categorical approach is incomplete. In his view, a state statute is not "divisible" simply because it includes alternative phrases that identify different ways of committing the offense. In addition, he claims, the federal sentencing court must determine, as a matter of state law, whether any alternative phrase represents a "means" of committing the offense rather than an "element." If the alternative phrase is a "means," he concludes, the modified categorical approach is inapplicable.

Petitioner uses the term "element" to refer to a component of a criminal offense that the jury must find beyond a reasonable doubt to convict, and the term "means" to refer to alternative ways of committing an offense that need not be specifically found by the jury. Pet. Br. 18-19; see, *e.g.*, *Schad* v. *Arizona*,

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[4] In *In re Chairez-Castrejon*, 26 I. & N. Dec. 478, 481-482 (B.I.A. 2014), the Board of Immigration Appeals determined that it would follow circuit law on when a statute is divisible or, if there is no such law, would base divisibility on whether a statutory alternative is a means or an element. The Attorney General is reviewing that holding; in the meantime, the Board's holding is not precedential or binding. *In re Chairez-Castrejon & Sama*, 26 I. & N. Dec. 686, 686 (A.G. 2015).

501 U.S. 624, 636 (1991) (plurality opinion) (distinguishing between "elements" and "alternative means of committing a crime"). For example, if a defendant is charged in one count with burgling both a building and an automobile, and the facts presented at trial support both theories, the place being burgled is a "means" if the jury can return a guilty verdict by finding that the defendant burgled a house *or* an automobile (without unanimously deciding which one). See *Richardson* v. *United States*, 526 U.S. 813, 817 (1999). But if the jury must agree upon whether that defendant burgled a house or an automobile to convict him, the place is an "element." *Ibid.*

As the example demonstrates, the distinction between an "element" and a "means" matters only in a case where the prosecution argues that the defendant committed the offense in multiple ways. See *Richardson*, 526 U.S. at 818. If a defendant is charged only with burgling a building, and the jury convicts him, the question whether the place is a "means" or an "element" never arises, because the answer does not matter—even if the type of place would be a "means" in a different case, it is an "element" in this case because it is the only place alleged, and so the jury must find that the defendant burgled that place to convict him. Accordingly, in many cases (where the defendant is charged on only one theory), the distinction between means and elements does not make a difference. Yet in petitioner's view, the possibility that a jury could convict a hypothetical defendant charged with alternative means without choosing between those means would defeat the use of the modified categorical approach in every case, even where only a single means is alleged.

2. Petitioner's primary contention (Br. 16-17, 21-25) is that this Court's cases already require his approach. In his view, the Court's references to the "elements" of state offenses in its modified categorical approach decisions were signals to federal sentencing courts that they should delve into state decisional law to determine whether a statutory alternative is a "means" or an "element" before finding a state statute divisible. That is wrong. Although the Court has referred to the "elements" of a state offense in describing its approach, the Court has explained that what it meant by "elements" is the statutory definition of the offense, not a distinction between "elements" and "means."

The Court adopted the categorical approach in *Taylor* to ensure that the ACCA enhancement would apply to any defendant with a prior conviction for generic burglary, meaning burglary as it was "commonly understood" in most of the States. 495 U.S. at 597. To that end, the Court directed sentencing courts to compare "the statutory definition of the prior offense" to the definition of generic burglary to see if there is a match. *Id.* at 602. If the "statutory definition" is broader than generic burglary but includes alternative phrasing that corresponds to generic burglary, the statute is divisible. *Ibid.* The Court's example of a divisible statute (a state burglary statute that "include[s] entry of an automobile as well as a building") shows that divisibility depends only on the statute's text, not on any inquiry into "means." *Ibid.* That conclusion is confirmed by the absence of any inquiry in *Taylor* into state law to determine how the State classified the alternative phrases. It was

enough for the Court that the alternatives were listed in the statute. *Ibid.*

In explaining its approach, *Taylor* sometimes used the term "elements" to refer to the statutory definition of a state offense. 495 U.S. at 588-589, 601. But the Court did not distinguish between parts of the statutory definition that are "elements" and those that are "means" or suggest that such a distinction mattered in determining whether a statute is divisible. Rather, the Court used the phrases "statutory definition" and "elements" interchangeably, including in stating its holding. See *id.* at 602; see also, *e.g.*, Model Penal Code § 1.13(9) (1985) (defining "element of an offense" as including all items in the description of the offense). And when the Court did distinguish between "elements" and other terms, the context made clear that "elements" meant "statutory definition," rather than the state-law label (*i.e.*, whether the State called the offense "burglary" or "breaking and entering"), 495 U.S. at 588-589, or "the facts of each defendant's conduct," *id.* at 601.

In *Shepard*, the Court likewise based the applicability of the modified categorical approach on the statutory definition, not any inquiry into "means." As in *Taylor*, the Court used the phrases "statutory elements" and "statutory definition" interchangeably. *Shepard*, 544 U.S. at 16, 17. The Court reaffirmed that under the categorical approach, sentencing courts should compare the "statutory definition of the prior offense," which it also described as the "elements," with the definition of generic burglary. *Id.* at 17 (citation and internal quotation marks omitted). The Court did not distinguish between "elements" and "means" or suggest that such a distinction matters.

Rather, the Court reaffirmed the approach in *Taylor* and clarified which conviction documents a court may review under that approach. *Id.* at 16-17.

3. In *Descamps*, the Court again used "elements" to refer to the statutory definition of an offense. The Court did not purport to change its settled approach but instead said that it simply was applying that approach. 133 S. Ct. at 2283-2286. In explaining the approach, the Court expressly equated "statutory definitions" and "elements": "Sentencing courts may 'look only to the *statutory definitions*'—*i.e.*, *the elements*—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Id.* at 2283 (emphasis added) (quoting *Taylor*, 495 U.S. at 600). The Court explained that, under this approach, a state statute is "divisible" when its text sets out "multiple, alternative versions of the crime." *Id.* at 2284. Those alternative "statutory phrase[s]," the Court explained, allow a court to use conviction documents "to determine which statutory phrase was the basis for the conviction." *Id.* at 2285 (quoting *Johnson*, 559 U.S. at 144). Although the Court also used the word "elements" to describe divisibility, *e.g.*, *id.* at 2281, the context makes clear that the Court meant how the statute was phrased, not how state law would treat a verdict in a case where multiple theories of violating the statute are submitted to a jury. See *United States* v. *Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014) (understanding that the Court used the word "elements" as a "shorthand" for the statutory text), cert. denied, 135 S. Ct. 1447 (2015).

Petitioner contends (Br. 21) that the Court adopted his approach to divisibility in *Descamps*. But the question presented in that case had nothing to do with

a state-law inquiry into "means." Rather, the question was whether the modified categorical approach could be used when a California statute was broader than generic burglary and did not include any alternative phrasing corresponding to generic burglary. 133 S. Ct. at 2281, 2285-2286. The statute criminalized "enter[ing]" certain locations with intent to commit theft but did not distinguish between unlawful entry (which corresponds to generic burglary) and lawful entry (which does not). *Id.* at 2282. That statute was not divisible, the Court explained, because it "define[d] burglary not alternatively, but only more broadly than the generic offense." *Id.* at 2283. As a result, a prosecutor would never be required to prove (or the defendant required to admit) that the defendant entered unlawfully, and so the conviction documents could not establish that the defendant had been convicted of generic burglary. *Id.* at 2285-2286.

Because the California statute failed to specify any alternative forms of entry, no question existed whether such an alternative form of entry would be a "means" or an "element" under state law. The Court mentioned "means" in this discussion only in repeating (and rejecting) the Ninth Circuit's explanation that it did not matter whether a state statute included "an *explicitly* finite list of possible means of commission" or "creates an *implied* list of every means of commission" by using an overbroad term. *Descamps*, 133 S. Ct. at 2289-2290 (quoting Ninth Circuit's decision). The Court explained that it does matter to divisibility whether the statutory text explicitly includes a list of alternatives; those alternatives set out what the jury must find (or the defendant must admit) to convict. *Id.* at 2286, 2290-2291.

Petitioner also relies (Br. 22-24) on a footnote of the Court's opinion, but that footnote disclaims petitioner's approach. In his dissenting opinion, Justice Alito had expressed concern that the Court's references to "elements" might be read to suggest that sentencing courts must ask whether statutory alternatives are "means" or "elements" under state law (*i.e.*, petitioner's approach). *Descamps*, 133 S. Ct. at 2297-2298. The Court refuted that suggestion, finding no "real-world reason" to worry about whether an alternative phrase is an "alternative means" or "alternative element":

> Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard*—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. at 2285 n.2. As in prior cases, the Court indicated that divisibility depends on whether a statute is "drafted in the alternative," and the Court rejected the view that a federal sentencing court must "parse state law" to determine whether an alternative phrasing represents a "means" or an "element." *Ibid.*

Petitioner suggests (Br. 23) that other language in the opinion establishes that a sentencing court always must ask whether an alternative phrase in a state statute is a means or an element. But the Court did not say that. Rather, as in *Taylor* and *Shepard*, it equated the statutory definition of an offense (the

"statutory phras[ing]") with "elements." *Descamps*, 133 S. Ct. at 2285 n.2 (citation omitted).[5] Only that explanation is consistent with the rest of the footnote, which explains that the distinction between means and elements does not matter to divisibility because a court need only look at the statutory text (*i.e.*, "whatever a statute lists"). *Id.* at 2285 n.2.

4. Both before and after *Descamps*, the Court has looked only to the statutory definition to decide whether a statute is divisible for purposes of the modified categorical approach. In none of its decisions has the Court distinguished between "elements" and "means" or suggested that a statute's divisibility turns on that distinction.[6] Instead, the Court reaffirmed that a statute is divisible, and therefore amenable to use of the modified categorical approach, if it is phrased in the "disjunctive," *Johnson*, 559 U.S. at 136,

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[5] The Court did the same thing elsewhere in its opinion when it distinguished between "elements" (the statutory definition) and the facts of a certain defendant's prior offense (which the Court called "legally extraneous circumstances" and "non-elemental fact[s]"). *Descamps*, 133 S. Ct. at 2288-2289. The Court did not refer to "means," and a statutory phrase that is a means of committing an offense is not an "extraneous circumstance"; it is a way to establish an element (and if only one means is charged, it is the element).

[6] See *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986-1988, 1990-1991 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013); *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012); *Sykes* v. *United States*, 564 U.S. 1, 6-7 (2011), overruled in part by *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015); *Johnson*, 559 U.S. at 144; *Nijhawan* v. *Holder*, 557 U.S. 29, 34-35 (2009); *Chambers*, 555 U.S. at 125-126; *Begay* v. *United States*, 553 U.S. 137, 141 (2008); *James* v. *United States*, 550 U.S. 192, 202 (2007), overruled in part by *Johnson*, 135 S. Ct. at 2563; *Duenas-Alvarez*, 549 U.S. at 186-187.

and therefore "separately describes" "different kinds of behavior," *Chambers*, 555 U.S. at 126. In those circumstances a court may look to approved conviction documents "to determine which statutory phrase was the basis for the conviction." *Johnson*, 559 U.S. at 144. The Court has repeatedly emphasized that the divisibility inquiry depends only on the "statutory definition" of the prior offense, *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 (2015); *Sykes* v. *United States*, 564 U.S. 1, 7 (2011), overruled in part by *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015); *James* v. *United States*, 550 U.S. 192, 202 (2007), overruled in part by *Johnson*, 135 S. Ct. at 2563; see also *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013).

If petitioner were correct, it would mean that this Court's decisions were either materially incomplete or wrongly decided. That is true not just for *Taylor* and *Shepard*, but also for the numerous other decisions in which the Court has addressed the modified categorical approach. The Court plainly did not think that a state-law inquiry into "means" mattered to divisibility, or the Court would have mentioned it in at least one of its decisions. It never did. Nor did it conduct the often-difficult state-law inquiry into whether a certain statutory phrase represents a "means" or "element."

Petitioner's response (Br. 23) is that all of the Court's prior cases "were premised on the conclusion that those statutes' explicit lists of alternatives referred to elements, not means." But if the Court intended for sentencing courts to undertake a state-law analysis into "means" before finding a statute divisible, the Court would have said so (so that courts would know there is such a requirement), and likely would have undertaken the analysis (so courts would have an

example of what to do). And it is far from clear that the statutes in those cases actually involved elements, as opposed to means. See pp. 36-37, *infra* (Massachusetts burglary example). The fact that the Court has never undertaken the analysis petitioner advocates is strong evidence that no such analysis is required.

Further, the Court has repeatedly provided an example to illustrate divisibility, and that example is just like this case. In each one of its decisions addressing burglary under the ACCA, the Court hypothesized a state burglary statute that prohibits unlawful entry of "an automobile as well as a building." *Descamps*, 133 S. Ct. at 2284; see *Shepard*, 544 U.S. at 17; *Taylor*, 495 U.S. at 599. The Court explained that because "one of those alternatives (a building) corresponds to an element in generic burglary" but "the other (an automobile) does not," the statute is "divisible" because it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct. at 2284; see *Shepard*, 544 U.S. at 17; *Taylor*, 495 U.S. at 599, 602. Petitioner now says (Br. 34-35) that some States treat the place being burgled as a "means," and in that circumstance, the state statute is not divisible at all. If petitioner's approach were correct, in many States, the Court's paradigmatic example of a divisible statute would not be divisible after all. It seems doubtful that the Court laid such a trap for the unwary.

C. Petitioner's Approach Is Not Necessary To Ensure That A Prior Conviction Is One For ACCA Burglary Or To Answer Constitutional Concerns

1. This Court has not required a court to determine whether a statutory alternative is a "means" or "element" before applying the modified categorical approach for good reason: it does not ultimately mat-

ter. The purpose of the modified categorical approach is to determine whether a prior conviction corresponds to a specified federal offense. *Taylor*, 495 U.S. at 599. When the statute of conviction lists alternative ways to commit an offense, the federal sentencing court must determine whether the defendant was convicted of an offense like the federal offense, *i.e.*, whether "the jury necessarily had to find" that the defendant committed the generic offense. *Id.* at 602. Doing so does not depend on whether the statutory alternative is a "means" or an "element." Rather, it depends on whether the conviction documents establish that the defendant was convicted of the generic offense, as opposed to something else. Put another way, the modified categorical approach itself provides the assurance that the defendant actually was convicted of the generic offense; no separate inquiry into "means" is necessary.

Consider two cases prosecuted under a state burglary statute that criminalizes unlawful entry (with the requisite intent) into a building or an automobile. See *Taylor*, 495 U.S. at 602. In the first case, the indictment charges the defendant with burgling a building, and no other place. If the judge or jury finds the defendant guilty of that charge, the conviction necessarily is one for generic burglary, because although the statute set out alternatives, only one alternative was charged, and so the factfinder "necessarily" had to find that alternative to convict. It does not matter whether the place being burgled was a means or an element under state law, because it was the only place alleged. Proof of the means is proof of the element, and no reason exists to distinguish between the two. See *Trent*, 767 F.3d at 1060 (The sentencing

court "can be sure that * * * the jury had to find that the statutory phrase was satisfied because there was no alternative ground available to it.").

In the second case, the indictment charges that the defendant burgled a building and an automobile, and the jury is instructed that it can convict by finding that the defendant burgled either place (*i.e.*, the type of place is a "means" rather than an "element"). If the jury finds the defendant guilty of burglary without specifying whether he burgled a building or an automobile, then the verdict does not "necessarily" establish that the defendant was convicted of generic burglary, and so the offense cannot be an ACCA predicate. *Taylor*, 495 U.S. at 599. But the reason the conviction is insufficient is not because the place being burgled is a "means" rather than an "element"—it is because the approved conviction documents do not establish that the defendant burgled a building, rather than an automobile.

Under petitioner's approach, in some States, neither conviction would qualify under the ACCA. His view is that the modified categorical approach cannot be used at all if the type of place burgled is a means under state law. So in the first case, a defendant who was charged with only burglary of a building under a statute that lists that alternative and was convicted of that offense would escape an ACCA enhancement if, in a hypothetical case where multiple places were charged, the jury would not be required to agree on the particular place burgled. That result makes no sense: the defendant was indisputably "found guilty of all the elements of generic burglary" (*Taylor*, 495 U.S. at 599), and how a different defendant "hypothetically *could have been* convicted" (*Descamps*, 133 S.

Ct. at 2288) should not matter. The defendant in the second case will not receive an ACCA enhancement, because his conviction documents do not establish that he was convicted of the version of the offense constituting generic burglary. But that does not justify exempting the first (and more typical) burglary case, where the statute lists alternatives, the defendant is charged with the generic alternative, and the "jury was actually required to find" that the defendant committed the generic offense. *Taylor*, 495 U.S. at 602; see *Descamps*, 133 S. Ct. at 2284 ("typical case" is where the prosecution charges only one of two alternative places). Just because "state law does not *always* require a jury to find" the type of place burgled "does not mean that a jury can *never* make such a finding or that a defendant can *never* admit to" it; "[i]n fact, that is precisely the function of the modified categorical approach: to determine whether the jury actually found or the defendant actually admitted the generic element." *United States* v. *Mayer*, No. 05-CR-60072, 2016 WL 520967, at *10 (D. Or. Feb. 5, 2016).

Petitioner contends (Br. 24-25) that the same argument could be made when the statute does not set out alternatives. But there is a critical distinction: when the statute does not specify alternatives, the jury would never be required to find (or the defendant to admit) one alternative, and so the federal sentencing court could not be sure that the defendant was convicted of generic burglary. The Court made this point in *Descamps* using a hypothetical statute prohibiting assault with a weapon: if the statute "criminalize[d] assault with any of eight specified weapons," and only assault with a gun qualified as an ACCA

predicate, a sentencing court could "check the charging documents and instructions" to determine whether the jury "necessarily found" that the defendant was convicted of the gun crime. *Descamps*, 133 S. Ct. at 2290. But if the statute required "only an indeterminate 'weapon,'" "that is all the indictment must (or is likely to) allege," "all the jury instructions must (or are likely to) mention," and "all the jury must find to convict the defendant." *Ibid.* Statutory alternatives matter because they set out what the jury is required to find; without such jury findings, a sentencing court would just be reviewing the "particular set of facts" in each defendant's case. *Descamps*, 133 S. Ct. at 2291.

Accordingly, ordinary application of the modified categorical approach ensures that an ACCA enhancement will apply only when the defendant's prior conviction necessarily was one for generic burglary. See *Rendon* v. *Holder*, 782 F.3d 466, 470 (9th Cir. 2015) (Graber, J., dissenting from denial of rehearing en banc) ("In all cases, the modified categorical approach will return a match *only* if we know that what the jury found is within the federal definition."). No need exists to engraft a separate state-law inquiry into "means" onto the Court's existing approach for determining whether a statute is divisible. All that would do is unfairly exempt defendants who actually were convicted of generic burglary.

2. Petitioner is likewise mistaken in contending (Br. 26-27) that his approach is required to avoid constitutional concerns. This Court has held that any fact, "[o]ther than the fact of a prior conviction," that increases the defendant's sentence beyond the otherwise-applicable statutory maximum must be proved to a jury beyond a reasonable doubt. *Apprendi* v. *New*

Jersey, 530 U.S. 466, 490 (2000); see *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (for guilty plea, facts must be "admitted by the defendant"). In the context of the modified categorical approach, that means that when a state statute includes alternative phrasing, a federal sentencing court may rely only on certain approved conviction documents to "identif[y] the defendant's crime of conviction." *Descamps*, 133 S. Ct. at 2288. In doing so, the sentencing court does not conduct its "own review of the record" to find facts about the defendant's offense, but instead uses the statutory definition and conviction documents to determine what the jury necessarily found in the prior case. *Shepard*, 544 U.S. 24-25 (plurality opinion).

Petitioner contends (Br. 26-27) that a threshold state-law inquiry into "means" versus "elements" is required to avoid constitutional concerns. But the Court's limitations on use of the modified categorical approach already allay those concerns. In *Shepard*, the Court limited the documents that can be used under the modified categorical approach to those with "conclusive significance" so sentencing courts would not make "disputed finding[s] of fact" about the prior offense. 544 U.S. at 25 (plurality opinion). The Court explained that a sentencing court may not review police reports or complaint applications because those documents might include disputed facts and therefore cannot demonstrate that the offense "necessarily involved * * * facts equating to generic burglary." *Id.* at 24 (plurality opinion) (internal quotation marks omitted); see *id.* at 20-21. These limitations apply in every case, without regard to whether a statutory phrase is a "means."

Accordingly, no Sixth Amendment concerns arise when a defendant is convicted of violating a disjunctive statute that sweeps more broadly than the ACCA definition of generic burglary and the federal sentencing court looks to his conviction documents to check that he was convicted of the generic offense. As the Court recognized, if a state statute prohibits burglary of a building or an automobile, the government charged burglary of a building and the jury convicted on that charge, the federal sentencing court "can be sure the jury * * * found" the fact that the defendant burgled a building. *Descamps*, 133 S. Ct. at 2284, 2288-2289.

Petitioner's argument assumes that a "means" is always a "legally extraneous fact[]." Br. 21; see Br. 22, 24-25. But in the cases like this one, where the prosecutor charged only one means and the defendant was found guilty of that charge, the factfinder necessarily had to find that each element was established beyond a reasonable doubt, and so the constitutional principle set out in *Apprendi* is satisfied. It does not matter that the alternative charged and proven in this case might be a "means" on which the jury could disagree in a different case.

3. None of petitioner's other proffered reasons justifies his proposed approach. Petitioner asserts (Br. 28) that the Court's settled approach is a difficult one because it requires "an inquiry into the facts" in each defendant's case. That is wrong; the Court's approach "look[s] only to the statutory definitions of the prior offenses" to determine if a statute is divisible, *Taylor*, 495 U.S. at 600, and then looks only to certain reliable conviction records to determine whether a defendant's conviction under a divisible statute was for the generic

federal offense, *Shepard*, 544 U.S. at 17. And if conviction documents do not clarify which version of the offense formed the basis for the conviction (Pet. Br. 28), then the prior conviction does not qualify under the ACCA. No separate, state-law inquiry into "means" is needed to protect against inquiry into facts.

Petitioner contends (Br. 29-30, 31-32) that allowing an enhancement when a statutory alternative is a "means" would deprive defendants of the benefits of their plea deals and make it difficult for defense attorneys to provide advice about whether a prior conviction could qualify as an ACCA predicate. But those criticisms depend on petitioner's assumption that the defendant pleaded guilty to a state offense that "d[id] not match" the elements of ACCA burglary. *Descamps*, 133 S. Ct. 2289. When the defendant's prior offense *does* match ACCA burglary (because the jury actually found or the defendant admitted an unlawful entry of a building or structure to commit a crime), then "there can be no unfairness" because the defendant "knew which statutory phrase formed the basis for the conviction." *Trent*, 767 F.3d at 1060; see *Mellouli*, 135 S. Ct. at 1987. It does not matter whether the statutory phrase represents a means or an element.

Petitioner also argues (Br. 30) that when state law defines two offenses, one of which is narrower than generic burglary and one of which is broader, and the defendant is convicted under the broader statute, it would be unfair to deem his conviction one for "burglary" under the ACCA. But since *Taylor*, it has been clear that a defendant's prior offense may qualify as generic burglary not only when the state statute is the

same (or narrower) than generic burglary, but also when the state statute is broader than generic burglary, so long as the statute is divisible and the conviction documents establish that the defendant was convicted of the alternative corresponding to generic burglary. 495 U.S. at 599. Petitioner's criticism is one of the modified categorical approach itself.

Finally, petitioner asserts (Br. 30-31) that defining divisibility based on the statutory definition would lead to unwarranted disparities among States. But the example he provides is not about whether a statutory phrase is a "means" or an "element"; it is about whether, in determining the scope of a state offense, a sentencing court should review judicial rulings interpreting the statute's text—a question the Court reserved in *Descamps*. See 133 S. Ct. at 2291. The Court has employed the same rule for divisibility for at least 20 years; if this rule created anomalous results, one would expect to see evidence of that. And petitioner's approach would create unjustified sentencing disparities among similarly situated defendants. By basing the ACCA's applicability on a state-law distinction between "means" and "elements," petitioner's approach would exempt from the statute's reach defendants who actually had been convicted of generic burglary. Cf. *Taylor*, 495 U.S. at 590-591 (finding it "implausible" that Congress intended the applicability of the ACCA to turn on state-law labels when defendants were convicted based on "exactly the same conduct").

D. Petitioner's Approach Would Create Significant Practical Difficulties And Thwart The Statute's Purposes

1. Determining whether a certain statutory phrase represents a "means" or "element" under state law

can be a difficult undertaking. State legislatures do not routinely specify whether a part of a statute is a "means" or an "element," leaving that question to be decided by the state courts on a statute-by-statute, phrase-by-phrase basis. See *Schad*, 501 U.S. at 636; see also, *e.g.*, *Fulmer* v. *State*, 401 S.W.3d 305, 311 (Tex. Ct. App.), cert. denied, 134 S. Ct. 436 (2013); *State* v. *Shaw*, 281 P.3d 576, 582 (Kan. Ct. App. 2012); *State* v. *Peterson*, 230 P.3d 588, 591 (Wash. 2010). And the issue does not arise with frequency in state courts, because it does not matter in the "typical case" of burglary, where a defendant is charged and tried only on one theory, not multiple theories. See *Descamps*, 133 S. Ct. at 2284; *Richardson*, 526 U.S. at 818.

As a general matter, the only way for a federal court (or a federal immigration judge) to know with certainty that a statutory phrase represents a "means" is to find an authoritative state court decision holding that when a jury was instructed on multiple theories corresponding to alternative phrases and the jury returned a guilty verdict but did not pick between the two theories, the verdict was permissible. See *Descamps*, 133 S. Ct. at 2298 (Alito, J., dissenting). Absent such a decision, a federal sentencing court (or immigration judge) would have to decide in the first instance whether a state legislature intended to require a jury to agree on a specific alternative when multiple alternatives are charged.

That is no easy task: whether a statutory phrase represents a means or an element is "a substantial question of statutory construction," *Schad*, 501 U.S. at 636 (plurality opinion), which often depends on a multi-factor inquiry, see *Richardson*, 526 U.S. at 820 (considering "language, tradition, and potential un-

fairness" to decide whether language in 21 U.S.C. 848 was a means or element); see also, *e.g.*, *State* v. *West*, 362 P.3d 1049, 1056-1057 (Ariz. Ct. App. 2015) (listing other factors). As one state supreme court has explained, "[t]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." *Peterson*, 230 P.3d at 591 (citation omitted); see also, *e.g.*, *State* v. *Brown*, 284 P.3d 977, 987 (Kan. 2012) (court describes its own definition of "alternative means" as "oblique[]" and "mind-bending in its application" and observes that it "has led to confusion and disagreement among panels of the Court of Appeals"). Yet under petitioner's view, federal sentencing courts (and immigration judges) would have to decide these state-law issues of first impression every day, even in the most routine cases.

2. An example illustrates the difficulties with petitioner's approach. This Court has, on many occasions, provided a Massachusetts burglary statute as an example of a divisible statute. See *Descamps*, 133 S. Ct. at 2284; *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009); *Chambers*, 555 U.S. at 126; *Duenas-Alvarez*, 549 U.S. at 186-187; *Shepard*, 544 U.S. at 16-17. That statute criminalizes breaking into a "building, ship, vessel, or vehicle." Mass. Gen. Laws Ann., ch. 266, § 16 (West 2014); see also *id.* §§ 16A, 17, 18 (containing similar lists). The statute is divisible, the Court has explained, because its text sets out alternative places. *E.g.*, *Nijhawan*, 557 U.S. at 35.

Petitioner assumes (Br. 31 n.12) that the Massachusetts statute is divisible. But he does not explain why. Determining whether the place being burgled is

a means under Massachusetts law requires determining whether jurors would have to agree on the type of place burgled, in a case that charges multiple places, to convict. Like Justice Alito, the government has not found any authoritative state decision answering that question. See *Descamps*, 133 S. Ct. at 2298 (Alito, J., dissenting). Massachusetts cases say what "the elements * * * are," but they generally repeat the statutory language and do not address the distinction between means and elements. See, *e.g.*, *Commonwealth* v. *Cabrera*, 874 N.E.2d 654, 657 (Mass. 2007). The Massachusetts model jury instructions are likewise unhelpful: they list each place in the alternative but they do not address whether the jury must be unanimous on the type of place when more than one place is charged.[7] It is accordingly unclear whether the Massachusetts burglary statute would be divisible under petitioner's approach. On this "means" question, like many others, a federal sentencing court would have to guess as to the state legislature's intent.

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[7] The relevant instruction provides: "The defendant in this case is charged with breaking and entering a (building) (ship) (vessel) (vehicle) in the nighttime, with the intent to commit a felony. * * * In order to prove the defendant guilty[,] the Commonwealth must prove four things beyond a reasonable doubt: * * * *First*: That the defendant broke into a (building) (ship) (vessel) (vehicle) belonging to another person; * * *" Mass. Crim. Model Jury Instruction 8.100 (2009 ed.). There also is a general unanimity instruction, and its commentary states that a jury need not unanimously agree on an "alternative method" for committing an offense. Mass. Crim. Model Jury Instruction 2.320 & comment. (rev. Jan. 2013). But the commentary does not specify whether the type of place burgled is such a method. And in any event, jury instructions are not necessarily an authoritative construction of state law.

Other statutes that this Court has assumed are divisible might not be under petitioner's approach. For example, the Court in *Descamps* assumed that a state statute criminalizing "assault with any of eight specified weapons" would be divisible. 133 S. Ct. at 2290. But some States treat the type of weapon as a means, rather than an element. See, *e.g.*, *Meredith* v. *United States*, 343 A.2d 317, 320 (D.C. 1975) (per curiam) (addressing D.C. Code § 22-3202 (1973)). Similarly, in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), the Court assumed that a state assault statute is divisible based on mental state. *Id.* at 1414. Yet the Court has recognized that alternative mental states are often treated as "means" under state law. See *Schad*, 501 U.S. at 632; see also *State* v. *Klinge*, 994 P.2d 509, 519-520 (Haw. 2000) (citing cases).

3. The experience in the courts of appeals that have adopted petitioner's approach provides additional evidence of the approach's shortcomings. For example, the Ninth Circuit has struggled in applying this approach. After a panel of the court of appeals adopted this approach, believing it required by *Descamps*, see *Rendon* v. *Holder*, 764 F.3d 1077, 1082-1083 (9th Cir. 2014), seven judges "emphatically dissent[ed]" from the denial of rehearing en banc, explaining that the prior textual approach to divisibility "is in no way problematic" and the court's new approach "sows confusion in our existing caselaw" and leads to "absurd[]" results, 782 F.3d at 467, 470-473 (Graber, J.).[8]

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[8] Judge Kozinski agreed that the panel's opinion "has led [the court] badly astray" and suggested a different approach, which looks to the *Shepard* documents to determine whether a statutory phrase is a means. *Rendon*, 782 F.3d at 474 (Kozinski, J., dissent-

As one example, these judges discussed use of the modified categorical approach to determine whether a state drug offense qualifies as a controlled substance offense under federal law. Many state drug laws include, on their lists of controlled substances, drugs that do not appear on the federal schedules. See *Mellouli*, 135 S. Ct. at 1984. Because the state laws are broader than federal law, courts must determine whether a defendant's prior state conviction corresponds to a federal offense. *Rendon*, 782 F.3d at 472 (Graber, J., dissenting from denial of rehearing en banc). This Court has assumed that the modified categorical approach can be used to answer that question. *Mellouli*, 135 S. Ct. at 1986-1987. But under petitioner's approach, these drug statutes may not be divisible by drug type.

"[D]espite thousands of drug convictions over decades of enforcement, there is no California court case on point answering whether a jury must be unanimous in th[e] exceedingly unusual circumstance" that drug type is charged in the alternative. *Rendon*, 782 F.3d at 472 (Graber, J., dissenting from denial of rehearing en banc); see *ibid.* ("In nearly every drug conviction in California, there is only one substance at issue."). And if the court determined that, "in the abstract, juror unanimity is not required"—*i.e.*, drug type is a "means" under state law—the result would be that the court "must ignore *all* California drug convictions in *every* context, even if everyone agrees that there was

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ing from denial of rehearing en banc). But he acknowledged that his approach has "its own set of problems." *Ibid.* The jury-unanimity question depends on interpreting state law, and an indictment alone cannot authoritatively answer that question. See *United States* v. *Howard*, 742 F.3d 1334, 1343 n.3 (11th Cir. 2014).

only one substance in the case at hand." *Ibid.* The judges noted that, before *Descamps*, the circuit had treated such state drug statutes as divisible, and one panel had relied on that holding post-*Descamps*. Although that panel characterized drug type as an element, not a means, under California law, *Coronado* v. *Holder*, 759 F.3d 977, 985 n.4 (2014), cert. denied, 135 S. Ct. 1492 (2015), another circuit judge observed that state law is not clear and suggested that the court of appeals "certify the jury unanimity question to the Supreme Court of California." *United States* v. *Ramirez-Macias*, 584 Fed. Appx. 818, 820 (9th Cir. 2014) (unpublished) (Hawkins, J., concurring), cert. denied, 136 S. Ct. 181 (2015). The inability of these court of appeals judges to determine the divisibility of drug statutes that federal sentencing courts confront every day demonstrates the unworkability of petitioner's approach.

The experience in the Fourth Circuit is similar. Circuit judges have struggled to determine whether an alternative is a means under state law, compare *Omargharib* v. *Holder*, 775 F.3d 192, 198-200 (2014) (concluding that type of taking in state larceny statute is a means), with *id.* at 200 (Niemeyer, J., concurring) (finding it "especially difficult" to discern whether the type of taking is a means), and have disagreed about what to do when state law is unclear, compare *United States* v. *Vinson*, 794 F.3d 418, 425-427 (4th Cir.), superseded on rehearing by 805 F.3d 120 (2015), with *id.* at 431-434 (Gregory, J., dissenting). As one judge remarked, the court of appeals' "ever-morphing analysis" and "increasingly blurred articulation of applicable standards" has "applie[d] a confusing layer" to

the modified categorical approach. *Omargharib*, 775 F.3d at 200, 202 (Niemeyer, J., concurring).

Federal district judges and immigration judges use the modified categorical approach every day in a variety of different contexts. See *James*, 530 U.S. at 215 (Scalia, J., dissenting). They "need a clear and easy-to-apply rule for distinguishing between statutes that are divisible and those that are not." *Almanza-Arenas* v. *Lynch*, No. 09-71415, 2016 WL 766753, at *9 (9th Cir. Feb. 29, 2016) (en banc) (Watford, J., concurring). Yet in the circuits where it has been adopted, petitioner's approach has failed to yield any "clear and workable standards." *Omargharib*, 775 F.3d at 200 (Niemeyer, J., concurring).[9] The result is more work for the courts and more arbitrary results for defendants.

4. Adopting petitioner's approach would severely undermine the ACCA's purposes. Congress enacted the ACCA to supplement States' law enforcement efforts by providing enhanced penalties for federal defendants who have repeatedly been convicted of serious crimes. *Taylor*, 495 U.S. at 581. Congress focused on burglary in particular because it is one of

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[9] See also, *e.g.*, *Almanza-Arenas*, 2016 WL 766753, at *9 (Owens, J., concurring) ("The only consistency in these cases is their arbitrariness."); *Rendon*, 782 F.3d at 473 (Graber, J., dissenting from denial of rehearing en banc) (lamenting the "undue and unsupported complicating of the modified categorical approach"); *Mayer*, 2016 WL 520967, at *10 (Ninth Circuit's approach "unnecessarily complicates the modified categorical approach" by requiring a federal court to determine "if the relevant state law requires a hypothetical jury to find the alternative elements in every hypothetical case"); *Murray* v. *United States*, No. 15-CV-5720, 2015 WL 7313882, at *5 (W.D. Wash. Nov. 19, 2015) ("The undersigned notes that this area of law is a hopeless tangle.").

the "crimes most frequently committed by * * * career criminals" and often involves violence. *Id.* at 581, 585. The Court developed a categorical approach in order to ensure that the ACCA would reach the definition of burglary "used in the criminal codes of most States." *Id.* at 598.

Yet petitioner's approach would call into question whether convictions under many state burglary statutes could ever qualify as ACCA predicates. Petitioner contends that Iowa's burglary statute cannot qualify because it prohibits unlawful entry into an "occupied structure," and then defines "occupied structure" with a list that contains items corresponding to generic burglary and some that do not.[10] That is a common formulation: it is used in the Model Penal Code, §§ 221.0, 221.1 (1980),[11] and in the criminal codes of many States.[12] And it is the type of statute ("a bur-

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[10] Petitioner is mistaken in suggesting (Pet. 7) that a court may not consider statutory definitions in deciding whether a state offense is divisible. This Court routinely uses cross-referenced definitions to determine the scope of crimes. See, *e.g.*, *Castleman*, 134 S. Ct. at 1413.

[11] *Taylor* cited the Model Penal Code's formulation as an example of the type of statute that could be the basis for an ACCA enhancement. 495 U.S. at 598 n.8.

[12] See Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (2015); Mont. Code Ann. §§ 45-2-101, 45-6-201, 45-6-204 (2015); N.H. Rev. Stat. Ann. § 635.1 (LexisNexis 2015); N.D. Cent. Code §§ 12.1-22-02, 12.1-22-06 (2012); Ohio Rev. Code Ann. §§ 2909.01, 2911.11-2911.13 (LexisNexis 2014); 18 Pa. Cons. Stat. Ann. §§ 3501, 3502 (West 2015); S.D. Codified Laws §§ 22-1-2, 22-32-1, 22-32-3, 22-32-8 (2006 & Supp. 2015); Wyo. Stat. Ann. §§ 6-1-104, 6-3-301 (2015). These are not the only state statutes that would be affected by petitioner's approach: the approach would apply to any statute that is broader than generic burglary, whether through a defined term, see, *e.g.*, Ky. Rev. Stat. Ann. §§ 511.010, 511.020, 511.040

glary statute * * * that prohibits 'entry of an automobile as well as a building'") that this Court has already described as divisible in several decisions. *Descamps*, 133 S. Ct. at 2284 (quoting *Taylor*, 495 U.S. at 602). Yet, aside from the decision petitioner has identified for Iowa, the government has been unable to locate any published state decision definitively resolving whether the type of place burgled under these statutes is a "means" or an "element."[13] And even if a few such decisions exist, they do not demonstrate that petitioner's approach is a workable one for the vast majority of States or the vast majori-

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(LexisNexis 2014) (defining "building" to include vehicles), or through a list of places that includes non-generic options, see, *e.g.*, 720 Ill. Comp. Stat. Ann. § 5/19-1 (West Supp. 2015).

[13] The government has identified some cases that come close but do not definitively resolve the issue. See, *e.g.*, *State* v. *Horner*, No. 43549-7-II, 2014 WL 1746074, at *4-*5 (Wash. Ct. App. Apr. 29, 2014) (unpublished) (calling the place being burgled an "alternative means" but then stating that it must be proven unanimously, which would only be true for an element), and *State* v. *Linehan*, 56 P.3d 542, 546 (Wash. 2002) (stating that "[d]efinition statutes do not create additional alternative means" but then citing cases stating that definition statutes do not create alternative *elements*), cert. denied, 538 U.S. 945 (2003); see also *State* v. *Smalls*, 519 S.E.2d 793, 795-796 (S.C. Ct. App. 1999) (holding that a particular type of building need not be charged in the indictment).

Petitioner's ability to find a decision addressing the issue in Iowa does not show that it can be done as a routine matter. Petitioner cited no state law to the district court and did not cite the decision on which he now relies (*State* v. *Duncan*, 312 N.W.2d 519 (Iowa 1981)) to the court of appeals; the case appeared for the first time in his merits brief in this Court. Petitioner's belated identification of a relevant state decision confirms that the task is not an easy one.

ty of crimes that carry sentencing or immigration consequences under federal law.

Petitioner's approach would take this Court far afield from where it started in *Taylor*. Instead of reaching burglary convictions from "most States," *Taylor*, 495 U.S. at 598, the ACCA may not reach many such convictions at all. Instead of the categorical approach functioning as an "on-off switch," *Descamps*, 133 S. Ct. at 2287, a federal district court (or immigration judge) would have to "delve[] into the nuances of" state law to determine whether a state statute is even divisible, *id.* at 2285 n.2. And instead of incapacitating career criminals who have repeatedly been convicted of burglary (such as petitioner), the approach would exempt precisely those defendants Congress intended to reach.

E. The Iowa Burglary Statute Is Divisible

1. Applying the correct approach, the Iowa burglary statute at issue is divisible. The Iowa statute prohibits any person from unlawfully "enter[ing]" (or breaking into or remaining in) "an occupied structure" with the "intent to commit a felony, assault or theft therein." Iowa Code § 713.1 (1989). The term "occupied structure" is defined by an exclusive list: "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place" that is used for overnight accommodations, business, or storage. *Id.* § 702.12.

The state burglary definition is broader than generic burglary because it covers not only unlawful entry into a "building" or "structure," but also unlawful entry into other places, such as "vehicle[s]." Iowa Code Ann. § 702.12 (1989). The state statute is divisible because it is phrased in the disjunctive and identi-

fies a finite number of alternative places that can be burgled. *Ibid.* As the district court recognized, the statute's list of alternatives is "exactly what makes it a divisible statute and allows the Court to go to the modified categorical approach." J.A. 29. Because the statute specifies alternative versions of the offense, at least one of which matches generic burglary, it is possible to use *Shepard* documents to confirm that a defendant was convicted of the generic offense (*i.e.*, entering a "building" or "structure") rather than a non-generic one (*i.e.*, entering a "vehicle").[14] Indeed, the Iowa statute is precisely the type of burglary statute that this Court already has found divisible. See, *e.g.*, *Taylor*, 495 U.S. at 602 (modified categorical approach applies when state burglary statute applies to automobiles as well as buildings); see p. 26, *supra*.

2. Petitioner's five convictions qualify as convictions for ACCA "burglary" under the modified categorical approach. The charging document for each conviction specifies that petitioner burgled a "building" or "structure," not any other type of place. See J.A. 60, 62-63, 65-66, 68-69, 71-72. Petitioner pleaded guilty to four of these offenses, and a jury found him guilty of the fifth. J.A. 61, 64, 67, 70, 73; PSR ¶¶ 37, 49-52; see *United States* v. *Broce*, 488 U.S. 563, 570

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[14] Petitioner contends (Br. 33, 35) that the definition of "occupied structure" merely provides a non-exhaustive, illustrative list of places that may qualify. He is mistaken. The statute sets out a disjunctive, finite list of places that are occupied structures and says that an occupied structure "is" a place on that list, not that an occupied structure "includes" a place on that list. Iowa Code § 702.12 (1989); see, *e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' excludes any meaning that is not stated." (citation omitted)).

(1989) (by pleading guilty, a defendant "admi[ts] that he committed the crime charged against him" (citation omitted)); Iowa R. Crim. P 2.8(2)(b) (court may not accept a guilty plea without first determining that it has a factual basis).[15] Petitioner's federal sentence therefore was correctly enhanced under the ACCA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[15] Petitioner suggests (Br. 9 n.5, 11, 28-29) that the basis for his prior convictions is unclear because the government introduced only charging documents for his prior offenses. He is mistaken: the conviction records include "recorded judicial acts of th[e] court" (*Shepard*, 544 U.S at 20) establishing that petitioner had been convicted of the charged offenses. See J.A. 61, 64, 67, 70, 73. In any event, petitioner never argued below that the documents provided by the government were inadequate to establish his convictions for the charged crimes, see Def.'s Sent. Mem. 4-6, and he has forfeited any such argument by failing to raise it in his certiorari petition.

APPENDIX

1. 18 U.S.C. 922 provides, in pertinent part

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. 18 U.S.C. 924 provides, in pertinent part:

Penalties

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not

suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct

that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

3. Iowa Code § 702.12 (1989) provides:

Occupied structure

An "*occupied structure*" is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure."

4. Iowa Code § 713.1 (1989) provides:

Burglary defined

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public,

or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

5. Iowa Code § 713.3 (1989) provides:

Burglary in the first degree

A person commits burglary in the first degree if, while perpetrating a burglary, the person has in the person's possession an explosive or incendiary device or material, or a dangerous weapon, or intentionally or recklessly inflicts physical injury on any person. Burglary in the first degree is a class "B" felony.

6. Iowa Code § 713.15 (1989) provides:

Burglary in the second degree

All burglary which is not burglary in the first degree is burglary in the second degree. Burglary in the second degree is a class "C" felony.